

**Summary of IDEM Workgroup Meeting  
ANTIDEGRADATION/OSRW**

Monday, October 20, 2003

IDEM, 100 N. Senate Ave., IGCN, 12<sup>th</sup> floor, Conference Room D, Indianapolis  
9:00a.m. – 2:00p.m. E.S.T.

**Introduction:**

On Monday, October 20, 2003, IDEM staff met for the twelfth time with a wide cross-section of stakeholders which make up the Antidegradation/OSRW workgroup. These notes are intended to be a summary of the major points from the meeting held at IGCN.

The meeting was called to order by Mary Ellen Gray.

Workgroup members in attendance for all or part of the meeting included: Art Umble, Bill Beranek, Bowden Quinn, Charlotte Read, Jane Dustin (by speakerphone), Kent Halloran, Neil Parke, and Ralph Roper.

Other participants included Albert Ettinger from the Environmental Law and Policy Center (ELPC) and Sierra Club, and Rae Schnapp from Hoosier Environmental Council.

In addition, the following IDEM staff members were present for all or part of the meeting: Dave Kallander, Dennis Clark, John Nixon, Lonnie Brumfield, and Megan Wallace.

**Summary:**

The workgroup discussed the following:

- A. Mary Ellen Gray reviews the agenda for the meeting. She states that Dave Kallander will walk through the draft rule changes. After going over all of the changes, the workgroup can discuss any issues that they have with the changes, as well as the issues on the list that was handed out with the meeting materials. She also states that if there are some issues that can't be resolved, IDEM will make their recommendation, including dissenting opinions and issues, and send the rule to the Water Pollution Control Board (WPCB).
- B. The meeting minutes from the August 15, 2003 workgroup meeting were approved with one change. Kent Halloran's name was spelled incorrectly. The change will be made and the minutes will be posted to the web.
- C. Dave Kallander reviews the changes that were made to the draft language. He explains the color key and states that all language referring to Outstanding Historical State Resource Waters (OHSRWs) has been removed. The workgroup raised many

issues of concern and many specific changes/areas for IDEM to look at. The specific changes/areas are listed as follows:

1. The key at the top of the draft rule needs to be changed to show where bold language came from vs regular type.
2. Look into adding “existing uses” to definition (13) ‘Criteria’.
3. Check definition (14) “Degradation”
  - (i) Is this exactly from SEA 431?
  - (ii) Does this change the law and how antideg is applied in GLI?
  - (iii) Check reference in rule.
  - (iv) How does this impact 327 IAC 5-2-11.7?
4. Check definition (18) “Draft Permit” to see if it is consistent with the current article 5.
5. Check definition (26) “High quality waters”. Does the definition capture what we mean? May have to work on language.
6. Check definition (30) “National Pollutant Discharge Elimination System” or “NPDES” to see if it is consistent with federal definition.
7. Check definition (34) “Outstanding national resource waters” or “ONRWs” to see if it is in conflict with the current GLI rules.
8. Check definition (40) “Point Source”. The definition cites a reference. Is that normal?
9. Do we need to include the reference in definition (42) “Pollution prevention”?
10. Need to check definition (43).
11. Check definition (46) “Recommencing discharger”. Will it affect the rest of the state?
12. Is definition (47) “Risk” necessary?
13. Definition (51) “Stream design flow” references “upstream from the source”. Is it sometimes downstream? Do we need to include downstream in the definition?
14. Do we need to put in dates for the Act and DNR in definition (52) “Threatened or endangered species”?
15. Check definition (54) “Tier II values”. Should the date of the standard be published?
16. Check definition (59) “Wastewater”. Is it consistent with 327 IAC 5-1.5-70?
17. Check definition (62) “Watershed”. Do we need to add statutory definition instead of just the citation? If we add statutory definition, we will have to change the definition if the statute changes.
18. Do we need a definition for “Tier II value”?
19. Should we keep the “Tier system” or get rid of the term “Tier” and just keep the meaning of each “Tier”?
20. Pg. 20 – (c)(1): Do the words “two (2) miles upstream” affect tributaries in the GLI area?
21. Pg. 21 – (c)(2)(B): Is this a complete sentence or does it need some grammatical work?
22. Pg. 21 – (c)(3): Should this be highlighted in yellow?
23. Pg. 22 – 327 IAC 2-1.3-5(b): Should there be an “and” or an “or” for subdivision (1) – (4)? Is this consistent with 327 IAC 5-2-11.7?

24. Pg. 23 – 327 IAC 2-1.3-5(b)(4): For “stream design flow”, do we want to refer to the definition or is it talking about some calculation that we need to find the correct link to?
  25. Pg. 25 – (b)(3)(A): Is the “impact will last less than twelve (12) months” in the GLI rules?
  26. Pg. 25 – (c)(3): Does this apply to expanding within a permit or only to new permits?
  27. Pg. 31 – 327 IAC 2-1.3-8: Why is this section separate from section 9? Look at rewording this section.
  28. Pg. 32 – Want to further clarify criteria for ONRWs.
  29. Pg. 33 – How does the agency measure excellent biological quality? Does IDEM measure at a minimum? Shouldn't we be measuring from the top?
  30. Pg. 33 – (d): Should all of the definitions be moved to one section?
  31. Pg. 38 – (E) – (I): Can this be changed? These provisions seem to make it hard for citizens to even get started with the petitioning process to designate an OSRW or ONRW.
  32. Pg. 38-39 – Section 9: Think about separating sections for ONRWs and OSRWs.
  33. Pg. 39-40 – Subsection (f) needs to be reviewed.
  34. Pg. 40 – Section 10(a)(6): Number (6) in green that is shown as stricken language needs to be looked at. Do we really want it out and what is it referring to?
- D. Charlotte Read asks about Limited Use. Denny Clark answers that it isn't being addressed in this rulemaking. Charlotte wants to know why it isn't being addressed and when it will be addressed. Mary Ellen Gray answers that Limited Use is part of Triennial Review, but it is not part of the four rulemakings going on now. She states that the four (4) workgroups were picked to deal with certain areas and that the rest will have to be dealt with later in other rulemakings.
- E. The workgroup discusses the \$500,000 payment option listed in 327 IAC 2-1.3-7(i) further. Albert Ettinger says that there is a big problem with how this is written. It is written as though a discharger can pay a \$500,000 fee and get out of an antideg review. This does not comply with federal requirements. Neil Parke summarizes his view on the intent of SEA 431. He thinks that the payment option was in addition to the antideg review. The workgroup agrees with this summarization and the language in (i) will be looked at.
- F. Albert Ettinger suggested sending comments on 327 IAC 2-1.3-6(d) language to Mary Ellen Gray.
- G. Mary Ellen Gray suggests revising the list of key issues to include the key issues that the workgroup came up with in this meeting. The revised list of key issues is attached at the bottom of the minutes.
- H. IDEM will send the workgroup some background documents including, the West Virginia court decision, comments from the 1999 Second Notice, EPA's comments on the 1999 draft, any federal guidance, and Region 8's guidelines on *de minimis*

before the next meeting. The next meeting will be held from 10:00a.m. – 3:00p.m. E.S.T. Locations up north are being looked into.

## **Unresolved issues in the Antidegradation Rulemaking**

1. In the current draft we propose to allow a *de minimis* that which ranges from 10% to as high as 30% of the unused loading capacity. In light of the recent West Virginia federal court decision (Ohio Valley Environmental Coalition vs. Horinko), should we change the *de minimis* to no higher than 10%? Is 30% of something ever really a '*de minimis*' portion? Do we include an overall cap on *de minimis*, an individual applicant cap on *de minimis*, or both?
2. What do we want to include in antidegradation demonstration and determination requirements? Do we want to use what we have in section 7 of the draft rule language? Do we want to include something else?
3. SEA431 allows dischargers to an OSRW that want to cause a significant lowering of water quality to pay a fee 'not to exceed \$500,000' for each significant lowering. How do we interpret SEA 431's intent with the \$500,000 fee? Does it apply to BCC's? Does the payment apply after an antidegradation review? SEA431 doesn't provide many details on how we should charge for increased pollutant discharges. Should there be a sliding scale based on the amount of unused loading capacity the discharger wants to use up? The statute requires the state to come up with criteria for the submission and approval of such projects. What should be required?
4. 327 IAC 2-1.3-6(d), exemptions to the antidegradation policy, needs to be reviewed. Is it illegal based on the West Virginia decision? Specifically look at "(d)(8) New or increased discharges subject to general permits under 327 IAC 15-5 and 327 IAC 15-6" and "(d)(9) New or increased discharges subject to general permits under 327 IAC 15-7 through 327 IAC 5-12".
5. How should we handle ubiquitous BCCs like mercury?
6. The current draft of the antideg rule requires that exceptional use waters have the same antideg requirements as OSRWs. This is consistent with what the water rules currently require but not consistent with the 1999 draft (they were rolled into the OHSRW group and given somewhat lower protection). SEA431 (P.L. 140-2000)/HEA1221 (P.L. 231-2003) requires they be treated same as OSRWs for situations when a significant lowering of water quality has been determined to occur but doesn't specify implementation procedures for BCCs and non-BCCs. Should we continue to go forward with the requirement that exceptional use waters be protected at the same level as OSRWs?
7. SEA431/HEA1221 requires the board to evaluate all the exceptional use waters and designate them as OSRWs or, presumably, to remove their special designation if they

don't merit the OSRW designation. No mention of this issue has been made in the current draft.

8. Can the petitioning process for designating OSRWs and ONRWs be improved to make it easier for the public to participate? Does the rule place the burden on the applicant or does much of the responsibility seem to be in limbo?
9. The WQAG debated the issues of how the state would make the decision on whether a significant lowering of water quality was necessary to accommodate important social or economic development in the area in which the waters are located. The WQAG report gave three possible options:
  - A. a particular industry or category of activity/situation is declared by the Water Pollution Control Board (by regulation) or by the General Assembly (by state law) "to accommodate important economic or social development in an area" no matter where or what other conditions exist;
  - B. IDEM uses its judgment to decide (ultimate responsibility), OR
  - C. the local government in the area makes a formal determination after appropriate public notice; IDEM can override this determination only with good cause (this could either be the mandatory first step for non-excluded industry or it could be an optional first step for non-excluded industry).

Which option should be incorporated into the rules?

10. The WQAG recommended a rather detailed procedure for calculating the ambient background concentration (or existing water quality) necessary for determining the "unused loading capacity" that is used to determine if a significant lowering of water quality has occurred (based on there being some "de minimis" level that is not considered a significant lowering of water quality). This procedure involved the evaluation of at least 10 samples collected over different times and flows and evaluated using a specific equation. The procedure and equation were developed by a separate group and presented as a proposal to the WQAG. The WQAG subsequently approved the procedure. Should this be used as the specific method to determine "ambient background concentration" (or existing water quality) for antidegradation purposes?
11. Consistency needs to exist between OSRWs and high quality waters. The antideg demonstration for OSRWs seems to be looser with the passage of SEA 431. One option is to have OSRWs go through high quality waters review first. How do we want to create consistency?
12. Criteria for ONRWs (pg. 32 – 327 IAC 2-1.3-8(b)) needs another look and maybe some more clarification.

13. Several areas need to be checked for consistency with SEA 431, the federal requirements, and the GLI rules. These areas include:

A. Pg. 13 - Def. (14) “Degradation”

B. Pg. 15 - Def. (34) “Outstanding national resource waters” or “ONRWS”

C. Pg. 22 – 327 IAC 2-1.3-4(b)

14. How are we going to handle 401 certification?

15. Other issues?